FILED

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

WISTON XXIV LIMITED PARTNERSHIP,

Petitioner,

v.

BALCOR PENSION INVESTORS V,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Wiston XXIV Limited Partnership filed its notice of appeal from the United States Bankruptcy Court after the court orally announced its decision from the bench, but before it formally entered the judgment on the docket sheet.

The lower courts held that the premature notice was ineffective to confer appellate jurisdiction on the district court. The question presented here is:

Should the 1994 amendment to Bankruptcy Rule 8002(b) be applied retroactively or should the trap created by the former rule be allowed to catch more unsuspecting litigants?

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No. _____

In The

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WISTON XXIV LIMITED PARTNERSHIP,

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BALCOR PENSION INVESTORS V,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Wiston XXIV Limited Partnership ("Wiston") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on December 28, 1994, in order to resolve the conflict between the Tenth and Ninth Circuit Courts of Appeals on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit that gives rise to this petition is

unpublished by order of the Tenth Circuit. It is reprinted in Appendix A hereto ("App. A") at page A-1. By order filed February 8, 1995, the Tenth Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. B, A-9.

JURISDICTION

On April 2, 1994 the United States Bankruptcy Court for the District of Kansas issued a memorandum decision rejecting Wiston's Fourth Amended Plan of Reorganization. The court orally overruled Wiston's timely-filed motion for reconsideration on April 13, 1994. On April 20, 1994 Wiston filed a notice of appeal to the United States District Court for the District of Kansas. On April 21, 1994, the bankruptcy court formally entered its order overruling Wiston's motion on the docket sheet.

The district court dismissed Wiston's appeal for lack of appellate jurisdiction. Wiston timely appealed to the Tenth Circuit, which affirmed in an opinion filed on December 28, 1994. On February 2, 1995 the Tenth Circuit denied Wiston's timely-filed motion for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Bankruptcy Rule 8002(b), as amended in 1994, provides:

> (b) **Effect of Motion on Time for Appeal.** If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion:
>
> (1) to amend to make additional findings of fact under Rule 7052, whether or not granting the motion would alter the judgment;
>
> (2) to alter or amend the judgment under Rule 9023;
>
> (3) for a new trial under Rule 9023; or
>
> (4) for relief under Rule 9024 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Rule 8001, to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file a notice, or an amended notice, of appeal within the time prescribed

> by this Rule 8002 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

Fed. R. App. P. 4(a)(4), as amended in 1993, provides:

(4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

> (A) for judgment under Rule 50(b);
>
> (B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;
>
> (C) to alter or amend the judgment under Rule 59;
>
> (D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;
>
> (E) for a new trial under Rule 59; or
>
> (F) for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of

> the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file an amended notice of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

STATEMENT OF THE CASE

The district court dismissed Wiston's appeal from the judgment of the bankruptcy court because Wiston's notice of appeal was filed prematurely. Wiston filed its notice of appeal after the bankruptcy court orally denied its motion for reconsideration, but before the court formally entered the order on the docket sheet.

The Tenth Circuit affirmed, holding that Wiston's premature filing was ineffective to confer appellate jurisdiction on the district court. The court held that because Wiston's notice of appeal was filed before August 1, 1994, the effective date of the 1994 amendment to Bankruptcy Rule 8002(b), the case was not "pending" on the effective date and therefore the appeal was properly dismissed. The court stated:

> [W]e look to the time at which the jurisdiction was to have attached: the date the appeal was filed. At no other time in the long history of this case, from the filing of the original Chapter 11

> petition to this very day, is the matter of pendency crucial at all.
>
> We conclude that this interpretation is the most rational. When Wiston made the procedural error that resulted in dismissal, the old rule was in effect and Wiston was on notice of that rule. We see no injustice in enforcing the jurisdictional requirement that governed the case at that time.

App. A, A-7 (footnote omitted).

Wiston's petition for rehearing and suggestion for rehearing en banc were denied.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Opinion Directly Conflicts With The Ninth Circuit's Ruling in *Arrowhead* And Is Contrary To The Liberal Policies Embodied In The Recent Amendments Of The Federal Rules of Appellate Procedure And Bankruptcy Rules

The decision below is in direct conflict with the Ninth Circuit's decision in *In re Arrowhead Estates Dev. Co.*, 43 F.2d 1306 (9th Cir. 1994). *See* App. C, A-11. Certiorari is appropriate here. *See Acosta v. Louisiana Dept. of Health & Human Res.*, 478 U.S. 251, 253 (1986) (Court granted petition to resolve conflicting interpretations of Fed. R. App. P. 4 and affirmed in *per curiam* opinion).

The Ninth Circuit in *Arrowhead* held that a notice of appeal filed after the bankruptcy court orally announced its ruling, but before formal entry on the docket sheet, was timely. The court stated that the liberal policies

embodied in the 1993 amendments to Fed. R. App. P. 4(a) should govern the court's interpretation of Bankruptcy Rule 8002(b). The court stated that its "interpretation of Bankruptcy Rule 8002 should be consistent with the amended version of FRAP 4(a), even though the parallel amendment to 8002 is not yet effective." *Id.* at 1310-11. In sharp contrast, the Tenth Circuit held that Rule 4(a) has no application here and that the amended Bankruptcy Rule does not apply to any notice of appeal filed before its effective date.

Wiston's notice of appeal would have been considered timely under the Ninth Circuit's analysis in *Arrowhead*. The 1993 amendments to Fed. R. App. P. 4(a), effective December 1, 1993, provide that "[a] notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry." Fed. R. App. P. 4(a)(2).

Arrowhead presents the better reasoned approach. The Advisory Committee Notes to the 1994 amendment of Bankruptcy Rule 8002(b) state that the rule was amended to *conform* to Fed. R. App. P. 4(a). Rule 4(a) was amended in 1993 to eliminate the "trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending." *See* Advisory Committee Notes to 1993 Amendments. Both rules were changed to avoid the result reached by this Court in *Acosta*, 471 U.S. 251, where the Court held that a premature notice of appeal is ineffective to confer appellate jurisdiction.

While *Arrowhead* effectuates the liberalism of the new rules, the decision below narrowly construes those rules to avoid the result intended by their amendments. The reasoning of the Tenth and Ninth Circuits creates conflicting results on virtually identical facts. In *Arrowhead* the notice was effective; in the instant case, it was not. The conflict is clear and irreconcilable. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX A

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

In re: WISTON XXIV LIMITED PARTNERSHIP, Debtor.
WISTON XXIV LIMITED PARTNERSHIP, Appellant,
and
Robert L. Thompson, Wiston Management, Inc., General Partners of Wiston XXIV Limited Partnership,
v.
BALCOR PENSION INVESTORS WESTERN RESOURCES, INC., Appellees.

No. 94-3281.

United States Court of Appeals, Tenth Circuit.

Dec. 28, 1994. ORDER AND JUDGMENT[1]

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[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of

Before MOORE and KELLY, Circuit Judges, and KANE,[2] District Judge.

Wiston XXIV Limited Partnership appeals the order of the district court dismissing its appeal from bankruptcy court. The only issue before us is whether the district court correctly dismissed Wiston's appeal on jurisdictional grounds. Finding ourselves in agreement with that disposition, we affirm.

Debtor Wiston XXIV Limited Partnership owns an apartment complex in Johnson County, Kansas. It filed a voluntary Chapter 11 petition in 1991.

On April 2, 1994, the bankruptcy court entered a memorandum decision rejecting Wiston's Fourth Amended Plan of Reorganization. On April 6, Wiston filed a motion for reconsideration. There was a hearing on April 13, and the court orally denied the motion. The court's minutes for that day read: "Court denies the motion for reconsideration. Mr. Margolies to do Order. Debtor can file notice of appeal and motion to stay pending appeal." On April 20, the court signed the order denying Wiston's motion for reconsideration. On April 21, the order was docketed.

On April 20, without waiting for entry of the bankruptcy court's formal order, Wiston filed its notice of

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orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

[2] Honorable John L. Kane, Jr., United States Senior District Judge for the District of Colorado, sitting by designation.

appeal of the bankruptcy court's denial of the reorganization plan. On July 15, the district court dismissed Wiston's appeal as untimely. Wiston filed a motion to alter or amend judgment of the district court, which was denied.

Wiston presents three issues on appeal. It assigns error to: (1) the district court's order dismissing Wiston's appeal from bankruptcy court; (2) the bankruptcy court's order rejecting the reorganization plan; and (3) the district court's refusal to reverse the bankruptcy court's grant of relief from automatic stay. Given the district court's disposition, however, only the first issue is before us.

The district court's order of July 15, 1994, addressed only two issues: (1) the timeliness of Wiston's appeal from bankruptcy court, and (2) an apparently unrelated liquidated damages issue raised by Balcor Pension Investors V, a creditor of Wiston, in its own appeal. The order never addressed the other issues Wiston now seeks to litigate. Issues not raised before the district court should not be considered on appeal except to avoid "manifest injustice." Hernandez v. Alexander, 671 F.2d 402, 407 (10th Cir.1982). To examine the merits of Wiston's case, then, we would have to assume the application of a bright line procedural rule is "manifest injustice." To state this hypothesis is to refute it.

The district court dismissed Wiston's appeal on jurisdictional grounds. We review jurisdictional issues on bankruptcy appeals de novo. In re Reliance Equities, Inc., 966 F.2d 1338, 1340 (10th Cir.1992). What we must now resolve is whether Wiston properly invoked the district

court's jurisdiction by attempting to appeal before the bankruptcy court had decided a motion questioning the order Wiston was trying to appeal.[3]

The predicate to the district court's appellate jurisdiction in bankruptcy is that the judgment, order, or decree appealed is "final." 28 U.S.C. 158(a). To establish the requirement of finality, Wiston argues a minute sheet is the functional equivalent of a final judgment. Wiston then contends, because its notice of appeal was filed after the minute sheet was docketed the appeal was taken from a final judgment. In support, Wiston cites several Seventh and Ninth Circuit cases and "respectfully submits" that Allen v. Horinek, 827 F.2d 672 (10th Cir.1987) is "erroeous."

Contrary views of our sister circuits notwithstanding, Allen holds squarely that a minute sheet entry does not constitute an appealable final judgment. Id. at 673. "[W]hen a tolling motion is made and a notice of appeal filed before its determination, a new notice must be filed within the prescribed time measured from the date of entry of the order disposing of the motion." Id. (emphasis in original). We stated, "Section 4(a)(4) is not to be construed as permitting an appeal to be taken after announcement of the court's decision but before the entry of an order." Id.

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[3] The district court dismissed the appeal as "untimely," but, because the appeal was filed early rather than late, it was actually premature. See Allen v. Horinek, 827 F.2d 672, 672 (10th Cir.1987).

Although Wiston invites us to overrule Allen, we must decline. We are bound by the decision unless it is overruled by the en banc court. United States v. Killion, 7 F.3d 927, 930 (10th Cir.1993), cert. denied, 114 S.Ct. 1106 (1994).

In apparent anticipation of this result, Wiston argues even if the minute sheet was not a final judgment, its appeal was still timely under Bankruptcy Rule 8002(b). This rule was amended effective August 1, 1994. The earlier version provided if a post-decisional motion is filed,

> [a] notice of appeal filed before the disposition of [that motion] shall have no effect; a new notice of appeal must be filed.

Bankruptcy Rule 8002(b) (1991).

The amended version states:

> A notice of appeal filed after announcement or entry of judgment, order or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order or decree, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding.

Bankruptcy Rule 8002(b) (1994).

Wiston correctly points out the advisory committee's note states this rule was amended to conform with Fed. R.App. P. 4(a)(4). The 1993 advisory committee's note to Rule 4(a)(2) states: "The amendment deletes the language that made paragraph (a)(2) inapplicable to a notice of appeal filed after announcement of the disposition of a posttrial motion enumerated in paragraph (a)(4) but before entry of the order. . . . "

Although this is a quite convincing statement of current law, it does not reflect the law applicable to this case. Wiston's actions in bankruptcy court and the district court order being appealed both occurred before the amendment took place.

The Order of the Supreme Court creating amended Rule 8002 states, "the foregoing amendments . . . shall take effect on August 1, 1994, and shall govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings in bankruptcy cases then pending." 154 F.R.D. 412 (1994). We believe this order is dispositive.[4]

Wiston's "case" was commenced prior to the effective date of the rule. Thus, this issue turns upon whether the case was still "pending" on August 1, 1994. This is an exercise in semantics.

The district court dismissed Wiston's appeal on July 15, 1994. However, its order on Wiston's motion to alter or amend judgment is dated August 19, 1994. Further complicating analysis is the fact this appeal arises out of a pending bankruptcy case, which apparently was not affected by the district court's order.

Where, then, does the concept of a "pending case" go to find a home? Can it be anywhere but that point at

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[4] There is no relevant case law on Bankruptcy Rule 8002. Both cases cited by Balcor, Pro Football Weekly v. Gannett Co., 988 F.2d 723, 725 (7th Cir.1993), and Hashemi v. Campaigner Publications, Inc., 784 F.2d 1581, 1583-84 (11th Cir.1986), decline to apply amended rules to proceedings already commenced. But in each case, there was no question that the proceedings were already concluded.

which the matter of pendency is crucial? We think not; therefore, we look to the time at which jurisdiction was to have attached: the date the appeal was filed. At no other time in the long history of this case, from the filing of the original Chapter 11 petition to this very day is the matter of pendency crucial at all.

We conclude that this interpretation is the most rational. When Wiston made the procedural error that resulted in dismissal, the old rule was in effect, and Wiston was on notice of that rule.[5] We see no injustice in enforcing the jurisdictional requirement that governed the case at that time.

Wiston finally argues that even if its appeal was defective, we should treat it as timely under Fed. R.App. P. 2. This rule allows the court to correct defects in procedure for good cause. The advisory committee's note calls this "a general authorization to the court to relieve litigants of the consequences of default where manifest injustice would otherwise result." 1967 advisory committee's note.

However, there is an explicit exception, spelled out both in Rule 2 and in Rule 26(b), which prohibits the court from enlarging time for appeal. Fed. R.App. P. 2, 26(b). Wiston argues that we could avoid this exception by simply treating the minute sheet as a final judgment. Although we have already demenestrated that notion, we

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[5] Indeed, from our own experience we note it was commonplace for lawyers facing similar conundrums to file two notices of appeal to avoid inadvertently losing appellate jurisdiction.

observe doing so would circumvent the clear meaning of Rules 2 and 26(b).

Although Rule 2 states, "a court of appeals may . . . suspend the requirements or provisions of any of these rules. . . . ," the phrase "these rules" means the rules of appellate procedure, not the bankruptcy rules. This appeal was taken under Bankruptcy Rule 8002. Moreover, Rule 2 "suspensions" cannot overcome jurisdictional hurdles. Torres v. Oakland Scavenger Co., 108 S.Ct. 2405 (1988). Indeed, the Torres Court particularly disfavored the use of Rule 2 to enlarge the time for filing appeals. Id. at 2407. Failure to file a timely appeal is the only jurisdictional problem in the appeals process. Fed. R.App. P. 3(a). We conclude relief under Rule 2 would not be proper.

In the alternative, Wiston asks us to allow the appeal to proceed under what it terms the "unique circumstances" doctrine. In Stauber v. Kieser, 810 F.2d 1 (10th Cir.1982), we denied a motion to dismiss an untimely appeal where the appellant had detrimentally relied on the district court's erroneous grant of an extension of time to bring a post-decisional motion. In this case, the district court made no such error. We see no "unique circumstances" here.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: WISTON XXIV LIMITED PARTNERSHIP, Debtor.	)	
WISTON XXIV LIMITED PARTNERSHIP, Appellant, and	)	No. 94-3281
ROBERT L. THOMPSON; WISTON MANAGEMENT, INC., General Partners of Wiston XXIV Limited Partnership, v.	)	
BALCOR PENSION INVESTORS V, WESTERN RESOURCES, INC., Appellees.	)	

ORDER
Entered February 8, 1995

Before SEYMOUR, Chief Judge, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, Circuit Judges, and KANE,* District Judge.

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*Honorable John L. Kane, Jr., United States Senior District Judge for the District of Colorado, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By /s/ L. Balzano
Deputy Clerk

APPENDIX C

In re ARROWHEAD ESTATES DEVELOPMENT CO., Debtor.
ARROWHEAD ESTATES DEVELOPMENT CO., Appellant,

v.

UNITED STATES TRUSTEE, Appellee.
In re Larry Edward Jarrett; Susanne Jarrett, Debtors.
William H. Fisher, Appellant,

v.

Larry Edward JARRETT; Susanne Jarrett, Appellees.

Nos. 93-55530, 93-56540.

United States Court of Appeals, Ninth Circuit.

Submitted on Briefs* Oct. 31, 1994.

Argued and Submitted Oct. 31, 1994.
Decided Dec. 30, 1994.

Debtor filed motion for reconsideration of order converting case from Chapter 11 to Chapter 7. The United States Bankruptcy Court for the Central District of California orally denied motion, and debtor appealed. The Bankruptcy Court subsequently entered order in its docket. The Bankruptcy Appellate Panel (BAP) dismissed appeal, and debtor appealed. In separate case, Chapter 7 debtros commenced adversary proceeding to determine validity of creditor's deed of trust and for damages

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* The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a) and Ninth Circuit Rule 34.4.

against creditor for willful violation of automatic stay. The Bankruptcy Court nullified deed of trust, and creditor filed motion for reconsideration. The Bankruptcy Court orally denied motion, and creditor filed application for leave to appeal. The Bankruptcy Court subsequently entered order in its docket. The BAP ruled that it had jurisdiction to consider appeal regarding motion for reconsideration, but not to consider appeal of judgment underlying motion. Debtor appealed. The Court of Appeals, Hawkins, Circuit Judge, held that: (1) Court's interpretation of bankruptcy rule governing timeliness of notices of appeal should be consistent with amended version of federal appellate procedure rule, even though parallel amendment to bankruptcy rule was not yet effective, (2) notices of appeal filed after bankruptcy courts' oral announcement of decision, but before entry of decision, were effective.

BAP reversed and remanded on first decision; BAP affimed in part, reversed in part, and remanded on second decision.

David Seror and Thomas M. Geher, Epstein, Becker & Green, Los Angeles, CA, for appellant-debtor Arrowhead Estates Development Co.

William H. Fisher, pro se.

No appearance for the appellees.

Appeals from the Ninth Circuit Bankruptcy Appellate Panel.

Before: FLOYD R. GIBSON,** HUG, and HAWKINS, Circuit Judges.

HAWKINS, Circuit Judge:

We consider here the timing of notices of appeal. In these appeals, certain of the parties filed notices of appeal after the bankruptcy trial court rendered its oral decision but before the entry of a formal order in the court docket. Because of this timing, the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") did not reach the full merits of these appeals. Given the choice, we opt for a consideration of the parties' claims on their merits and we return them to the courts below to do just that.

In the first of these appeals, Arrowhead Estates Development Co. ("Arrowhead") appeals from an order of the BAP dismissing its appeal as untimely. In the second, William H. Fisher ("Fisher") appeals the BAP's decision that it had jurisdiction to consider his appeal regarding his motion for reconsideration, but not to consider his appeal of the judgment underlying that motion. For the reasons set forth below, we reverse the BAP's determination in Arrowhead and affirm in part and reverse in part the BAP's ruling in Jarrett. We remand both cases for further proceedings consistent with this opinion.

** Hon. Floyd R. Gibson, Senior United States Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

FACTUAL AND PROCEDURAL HISTORY

A. ARROWHEAD

On May 6, 1992, the United States Bankruptcy Court for the Central District of California entered an order converting Arrowhead's Chapter 11 reorganization petition to a Chapter 7 liquidation. Arrowhead filed a motion for reconsideration on May 15, 1992. The bankruptcy court heard and orally denied Arrowhead's motion on June 9, 1992, but this order was not entered in the court's docket until August 25, 1992. Arrowhead filed a notice of appeal to the BAP on June 16, 1992, after the court's oral ruling, but before its entry in the docket. Arrowhead did not file a new notice of appeal after the order was entered.

On March 2, 1993, the BAP dismissed the appeal concluding that it lacked jurisdiction because Arrowhead filed its notice of appeal before the entry of the formal order denying reconsideration. Arrowhead thereafter pursued this appeal on March 31, 1993. We reverse.

B. JARRETT

On April 9, 1986, Edward Fisher agreed to Loan Larry Jarrett and Arthur Clark $10,000, and they agreed to repay him $20,000 on a straight note forty-five days later. The loan was secured by a deed of trust on the Jarretts' home conveyed by Jarrett and Clark.[1] In separate

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[1] Although Clark had no interest in the Jarretts' property, he signed the deed of trust as a grantor. Fisher attempted to argue that this act constituted fraud, but the BAP concluded that

transactions on April 17 and April 25, 1986, Fisher loaned Clark an additional $25,000 and $5,000 respectively.

On June 16, 1986, Clark repaid $5,000 by personal check. On September 24, 1986, Clark gave Fisher a cashier's check for $25,000, of which Fisher retained approximately $15,000. The remaining balance of the September 24 payment was distributed to Jarrett and a third party to whom Clark owed money. Although these payments amounted to $20,000, Fisher did not release the deed of trust; instead he filed a three-day demand for payment on September 7, 1988.[2]

The Jarretts commenced a Chapter 13 filing on April 7, 1989. On May 25, Fisher sued the Jarretts and Clark in state court for fraud. On July 5, 1989, the Jarretts commenced an action in the bankruptcy court to determine the validity of Fisher's deed of trust and for damages against Fisher for willful violation of the automatic stay established by the bankruptcy laws.

After being notified by the bankruptcy court that his suit violated the automatic stay, Fisher dismissed his state court claims as to the Jarretts.[3] Fisher was not present when the trial on the deed of trust began on October 20,

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the collateral documents accompanying the deed of trust adequately identified the Jarretts as the true owners of the property.

[2] In his brief, Fisher asserted that the reason he refused to release the deed of trust was that the payments from Clark were to repay the separate loans to Clark, not to repay the deed of trust loan. We do not reach this issue, however, as it involved the merits of Fisher's appeal which are not properly before us.

[3] Fisher prevailed against Clark on the fraud claims in state court.

1989, but Fisher did attend when the trial was continued to November 9, 1989, and the court granted the Jarretts' summary judgment motion for $1,000 damages against Fisher for violation of the stay. Trial on the deed of trust was continued to December 7, 1989. Again, Fisher did not attend that proceeding.[4]

At trial, Jarrett and Clark testified that the payments made by Clark to Fisher in June and September of 1986 were intended to repay the original $20,000 debt that was secured by the deed of trust. Satisfied with this testimony, the bankruptcy court entered an order nullifying the deed of trust on December 20, 1989. Fisher moved for reconsideration of this order on December 27. The trial court heard and orally announced its denial on Fisher's motion on February 8, 1990, but this order was not entered in the court's docket until March 5. After the denial was announced, but before the entry in the docket, Fisher filed an application for leave to appeal on February 21, 1990.[5] He did not file a new notice of appeal after the order was entered.

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[4] At the hearing on his reconsideration motion, Fisher attempted to present evidence that his health prevented him from attending the trial.

[5] In its Memorandum, the BAP stated that its "practice is to treat a motion for leave to appeal as a notice of appeal where appropriate."

DISCUSSION

These appeals concern the effectiveness of a notice of appeal filed after a trial court orally announces its decision but before the formal entry of an order on the court's docket.[6]

A. ARROWHEAD

In its brief, Arrowhead first contends that the BAP's reliance on Acosta v. Louisiana Dep't of Health & Human Res., 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986), and In re Sweet Transfer & Storage, Inc., 896 F.2d 1189 (9th Cir.1990), was misplaced because those cases interpreted older and different versions of Federal Rule of Appellate Procedure ("FRAP") 4(a)(4) and Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 8002(b) than are currently in force. Second, Arrowhead argues that the unique circumstances of its appeal warrant a finding that the appeal was timely. Our disposition of the first argument makes consideration of the second unnecessary.

Acosta sought to resolve a conflict in the circuits concerning the proper interpretation of FRAP 4(a). 478 U.S. at 252-253, 106 S.Ct. at 2876-77. In Calhoun v. United States, 647 F.2d 6 (9th Cir.1981), this Court held that a notice of appeal filed after the announcement but before

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[6] While this issue is not raised by Fisher's brief in Jarrett, it is a jurisdictional issue that was raised sua sponte by the BAP, and upon which its decision rests. See In re Martinez 721 F.2d 262, 264 (9th Cir.1983); Csibi v. Fustos, 670 F.2d 134, 136 n. 3 (9th Cir.1982) (per curiam).

the entry of a decision on a motion for reconsideration was effective. According to Calhoun, "the word 'disposition' means announcement of the court's decision on the motion." Id. at 10. The Fifth Circuit, on the other hand, held the view that a notice of appeal filed any time before the entry of the court's decision is premature and has no effect. Acosta v. Louisiana Health & Human Res., 776 F.2d 1046 (5th Cir.1985) (table); see also Ross v. Global Marine, Inc., 859 F.2d 336, 340 (5th Cir.1988).

To resolve this conflict, the Supreme Court relied on the portion of FRAP 4(a)(4) that provided: "A notice of appeal filed before the disposition of [a motion for reconsideration] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion." The Court held that the Calhoun decision failed to comport "with the plain wording of the Rules." Acosta, 478 U.S. at 253, 106 S.Ct. at 2877. Additionally, the Court noted FRAP 4(a)(2)'s statement that " '[e]xcept as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.' " Id. at 254, 106 S.Ct. at 2877-78 (emphasis in original). Calhoun's interpretation, said the Court, would effectively read this exception out of the Rule. Id.

In Sweet Transfer, 896 F.2d at 1189, this Court considered the effect of Acosta on our interpretation of Bankruptcy Rule 8002. We pointed out that Rule 8002(b) historically has been construed to be consistent with FRAP 4(a)(4), so Acosta controlled the issue of timeliness in bankruptcy appeals. Id. at 1192. Additionally, we

stated that "given the stricter language of the bankruptcy rule (there is no equivalent to Fed.R.App.P. 4(a)(2) in BR 8002) it should not be construed more liberally." Id.

However, in 1991, Bankruptcy Rule 8002(a) was amended to provide that "[a] notice of appeal filed after the announcement of a decision or order but before the entry of the judgment, order, or decree shall be treated as filed after such entry and on the date thereof." The purpose of this amendment was "to conform with rule 4(a)(2) which is designed to avoid the loss of the right to appeal when a notice of appeal is filed prematurely." Bankruptcy Rule 8002(a) (Advisory Committee's note to 1991 amendment). Thus, it appears that Sweet Transfer's concerns regarding liberally construing Bankruptcy Rule 8002 were resolved by that amendment.[7]

Additionally, a recent amendment to FRAP 4(a) essentially enacts the Calhoun interpretation of the Rule. The amendment eliminated the exception language from FRAP 4(a)(2), making the provision that "[a] notice of appeal filed after the court announces a decision or order but before entry of the judgment or order is treated as filed on the date of and after entry" applicable to all judgments, even those concerning the motions enumerated in Rule 4(a)(4).[8] Moreover, subparagraph (a)(4) was also amended to provide:

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[7] Bankruptcy Rule 8002(a), as amended, contains no corollary to the exception in FRAP 4(a)(2) relied upon in Acosta. Therefore, Bankruptcy Rule 8002(a) is actually more flexible than was FRAP 4(a)(2) at the time of Sweet Transfer.

[8] The language deleted by the amendment was the same language Acosta held that Calhoun was reading out of the Rule. See Acosta, 478 U.S. at 254, 106 S.Ct. at 2877-78.

> (4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure: [several enumerated motions follow, including a motion to alter or amend the judgment under Rule 59, which can encompass a motion for reconsideration].
>
> A notice of appeal filed after announcement of the judgment of but before the disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding.

Fed.R.App.P. 4(a)(4) (emphasis added).

The purpose of the amendment was to eliminate a "trap [created] for an unsuspecting litigant who files a notice of appeal" before the disposition of a post trial motion. Fed.R.App.P. 4(a)(4) (Advisory Committee's note to 1993 amendment). "Many litigants, especially pro se litigants, fail to file the second notice of appeal, and several courts have expressed dissatisfaction with the rule." Id. This "trap" is exactly what caught Arrowhead, and caused the BAP to dismiss its appeal.

This Court's interpretation of Bankruptcy Rule 8002 should be consistent with the amended version of FRAP 4(a), even though the parallel amendment to 8002 is not

yet effective.[9] We have held that "we should construe Bankruptcy Rule 802 [now 8002] in the same manner as we do Appellate Rule 4(a). The policies underlying the federal rules would not be advanced by a contrary result." In re Brickyard, 735 F.2d 1154, 1156 (9th Cir.1984); see also In re Magouirk, 693 F.2d 948, 951 (9th Cir.1982); In re Estate of Butler's Tire & Battery Co., 592 F.2d 1028, 1031 (9th Cir.1979); In re Brandig Iron Steak House, 536 F.2d 299, 301 n. 1 (9th Cir.1976). It follows then, that the result in this case should not be inconsistent with the amended version of Rule 4(a).

That the amendment to FRAP 4(a) became effective after Arrowhead lodged its appeal does not preclude application of the amended rule to this case.[10] While there is often a presumption against retroactive application of new legislation to pending cases, this presumption generally does not apply to rules conferring or withdrawing jurisdiction. Landgraf v. USI Film Prods., ___ U.S. ___, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). "Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " Id. at ___, 114 S.Ct. at 1502 (quoting Republic Nat'l Bank v. United States, ___ U.S. ___, ___, 113 S.Ct. 554, 565, 121 L.Ed.2d

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[9] An amendment to Bankruptcy Rule 8002(b) that would conform to the new amendment of FRAP 4(a)(4) has been proposed, but is not yet effective. See Proposed Amendments to the Federal Rules of Bankruptcy Procedure, Rule 8002.

[10] The BAP entered its Order of Dismissal on March 2, 1993, and Arrowhead filed its notice of Appeal to this Court on March 31, 1993. The amendment to FRAP 4 became effective on December 1, 1993.

474 (1992) (Thomas, J. concurring)); see also Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978); Order Amending Bankruptcy Rules and Forms, 421 U.S. 1021 (1975). Additionally, "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." Landgraf, ___ U.S. at ___, 114 S.Ct. at 1502.

B. JARRETT

A motion for reconsideration may be brought under either Fed.R.Civ.P. ("FRCP") 9(e) or 60(b). School Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1262 (9th Cir.1993), cert. denied, ___ U.S. ___, 114 S.Ct. 2742, 129 L.Ed.2d 861 (1994). Since Fisher did not specify which rule supported his motion, the BAP considered the denial of the motion under both standards. See id. at 1262-63.

The BAP first analyzed the motion under FRCP 59(e), and held that "[p]ursuant to Rule 8002(b), when a tolling motion is made, a new notice of appeal must be filed after disposition of the motion in order to perfect an appeal from the underlying judgment." Because Fisher filed his application for leave to appeal after the oral announcement but before the entry of the bankruptcy court's decision, the BAP held that the appeal was untimely under Bankruptcy Rule 8002(b). For the reasons expressed in the Arrowhead discussion above, this ruling is reversed.

However, the BAP also analyzed the motion under FRCP 60(b) because Fisher alleged that Jarrett and Clark had committed Fraud and perjury by their testimony at trial. Applying FRCP 60(b), the BAP held the denial of

Fisher's motion for reconsideration to be a final appealable order which allowed the filing of a prospective notice of appeal under Bankruptcy Rule 8002(a). This characterization permitted the BAP to review the denial of the motion without reaching the underlying judgment. The BAP determined that the bankruptcy court did not abuse its discretion by denying Fisher's motion for reconsideration. Fisher has not specifically challenged this ruling on appeal, but seeks only to have us review the merits of his appeal. Therefore, we affirm the BAP's determination under FRCP 60(b), but reverse its holding with regard to FRCP 59(e).[11] We remand this case to the BAP to consider the merits of Fisher's appeal of the judgment setting aside his deed of trust in the Jarretts' property. This was the judgment underlying his motion for reconsideration, but it was not reviewed by the BAP because of the BAP's analysis under Rule 59(e).

CONCLUSION

We hold that the 1991 amendment to Bankruptcy Rule 8002 and the 1993 amendment to FRAP 4(a) provide a sufficient basis for distinguishing Acosta and Sweet Transfer from the present cases. Accordingly, we reverse the BAP's decision to dismiss Arrowhead's appeal, and its decision not to allow Fisher's appeal of the judgment

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[11] While our holding does not upset the BAP's analysis under FRCP 60(b), the BAP may wish to reconsider its holding after evaluation of the merits of Fisher's appeal.

underlying his motion and we remand the appeals for consideration of their merits.

REVERSED.